

**Atlas Railroad Construction Co. and Richard L. Kimble, Case 9-CA-16173**

July 22, 1982

**DECISION AND ORDER**

**BY CHAIRMAN VAN DE WATER AND  
MEMBERS FANNING AND HUNTER**

On March 15, 1982, Administrative Law Judge Richard A. Scully issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.<sup>1</sup>

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,<sup>2</sup> and conclusions<sup>3</sup> of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Atlas Railroad Construction Company, Eighty-Four, Pennsylvania, its officers, agents, successors and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

<sup>2</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>3</sup> We agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(3) and (1) of the Act by refusing to reemploy Richard Kimble because of his prior activities as union steward. In so doing, we find it unnecessary to rely on *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966).

**DECISION**

**RICHARD A. SCULLY, Administrative Law Judge:** Based on a charge filed on December 8, 1980, by the Charging Party, Richard L. Kimble,<sup>1</sup> a complaint was issued by the Regional Director for Region 9 of the National Labor Relations Board (the Board), on January 22, 1981, alleging that Atlas Railroad Construction Co.

<sup>1</sup> The names have been amended to reflect the correct names of the parties in accordance with information provided by counsel at the hearing.

(herein the Respondent) engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein the Act). Specifically, it is alleged that the Respondent violated the Act by threatening an employee with unspecified reprisals because of his union activities; by informing an employee that another employee would not be recalled to work because of the latter employee's union activity; and by failing to recall Richard L. Kimble to work because of his union activity. The Respondent filed a timely answer denying that it had committed any violation of the Act.

A hearing was held in Charleston, West Virginia, on October 5, 1981, at which the parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. Based on the entire record and upon my observation of the demeanor of the witnesses, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

At all times material herein, the Respondent was a Pennsylvania corporation, with offices at Eighty-Four, Pennsylvania, engaged in railroad track construction work throughout the eastern United States. During the 12 months preceding the filing of the complaint, a representative period, the Respondent performed services valued in excess of \$50,000 in States other than Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

The Respondent admits, and I find, that United Mine Workers of America, Local 1582 (herein the Union), at all times material herein, was a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. The Facts**

In the course of its business of constructing and repairing railroad tracks, the Respondent did work at a coal mine site in Julian, West Virginia, from about mid-May through the end of August 1980. Labor on this job was provided pursuant to a contract with the United Mine Workers. Richard Kimble worked for the Respondent throughout the entire Julian job and served as the sole union steward for the 12 to 15 members of the crew working there. During the course of the Julian job, Kimble initiated several grievances against the Respondent concerning the correct wage rate, lack of drinking water, bathroom and changing room facilities, insurance coverage, showup time, and the use of nonunion labor on two occasions. In each instance, Kimble contacted Union Field Representative Romey Nelson who, in turn, went to the jobsite and discussed the matter with Norval

Keller, the Respondent's vice president of operations and the general superintendent of the Julian job.

Nelson testified that Keller was "irritated" during their discussions concerning the wage rate and bathroom facilities, that their conversation concerning insurance "got heated," and that Keller "was quite upset" when told what kind of insurance coverage the contract required. He also testified that Keller was "very upset" over the showup time requirement because "he couldn't see where he had to pay anybody if they didn't actually work." Keller did not deny being upset over these incidents, but stated that this was his first involvement with a UMW contract and he was unfamiliar with its terms. In each case, Keller eventually acceded to the Union's demands and all of the grievances were satisfactorily resolved by the Respondent's either providing what the contract called for or, in the case of the use of nonunion labor, making payments to persons on the Union's layoff panel.

One day during the Julian job it started to rain and about midday Richard Kimble told Keller that the men were going home but that they were entitled to be paid for a full day under the terms of the contract. Keller testified that he was "furious about it" because he felt Kimble had "done us wrong" and that the crew should have made an effort to get more work in. Keller and Kimble had a heated exchange of words during which Keller stated that they "were all big union people now" because they were "on a coal mine job for a while"; that Kimble thought he "had a lot of power"; and that Keller would show him "who had the power."<sup>2</sup> The exchange ended with Kimble telling Keller there should be no grudges held because he was just doing his job as steward and Keller replying that there would not be any grudges held. Later in the day, Kimble learned that he had been wrong about the workers' being entitled to a full day's pay and told this to Keller and apologized to him when they met that evening at a bar near the work-site. Kimble suggested that Keller should buy a round of beers, which he did.

Keller left the Julian job before it was finished and went to Massachusetts to begin a large project known as the "Boston job." Rocky Kimble testified that, after the Julian job had ended, he telephoned Keller in Massachusetts and asked if there was work available for himself and three or four others. Keller asked who they were and when Rocky mentioned his brother, Richard, Keller replied: "Stop right there, that man will never work for me again." Rocky also mentioned Tim Hayes and Mark Woods and Keller said he did not know them. Keller asked if Chuck Hixanball was working and told Rocky that he, Hixanball, and "one other guy" should come to the Boston job. Rocky contacted Hixanball and learned that he did not want to go to the Boston job because it was too far from home. Rocky called Keller back the same day, told him Hixanball was not coming, and asked if Richard Kimble could come in place of Hixanball. Keller again told him that Richard would "never work

for Atlas Railroad again." Rocky asked if Keller was holding the Julian job against Richard and said, if so, he should not because Richard was only doing his job. Keller's reply was an obscene reference to what he felt Richard had done to him on the Julian job. He went on to say: "Now it is turned around, I have got the power and now I am going to do my job and I don't want to hear anymore about it." Keller then told Rocky "and the other guys to be at work Tuesday morning." When Rocky, Hayes, and Woods arrived at the Boston job the following Tuesday, they were unable to go to work because of a dispute between the Respondent and a local union over the hiring of out-of-state workers. However, Rocky started working within 3 or 4 days and Hayes and Woods were hired within a week thereafter. Rocky continued to ask Keller if he would hire Richard but he refused to do so.

Richard Kimble testified that he telephoned Keller in November 1980, and asked if there was any work available and Keller said no and that things were slow. Kimble asked him about a job in Indianhead, Maryland, and Keller said he would not be interested as it was a small job. Kimble asked Keller if he was holding him responsible for the Julian job and Keller said that he was holding Kimble and another person he would not name responsible and that the only way he would hire Kimble again was on another UMW job and only because Kimble had seniority. Richard Kimble also testified that when he sought work at Indianhead from the Respondent's superintendent on that job, Wayne Thomas, he was told that Thomas would have to check with another official of the Respondent, Ralph Goulac. Thomas later told Kimble that Goulac had checked with Keller and Keller had said that Kimble could not be hired because Kimble had "screwed him in the past."<sup>3</sup>

Keller denied that he ever told Rocky Kimble that Richard Kimble would never work for Atlas again and testified that he did not recall Rocky's calling him in early September before he came to work on the Boston job or asking about bringing along Woods and Hayes. According to Keller, about a month after Rocky started working on the Boston job, he telephoned Keller from West Virginia to say that he could not get back to Massachusetts because someone's vehicle had broken down and during the conversation said "he would like to get his brother back on." Keller told him that he was not going to hire anyone because of his problems with the local union and that if Richard wanted on the local union would have to put him to work. Keller also testified that he arranged for Rocky to get a ride to Massachusetts on a truck bringing materials to the job from Eighty-Four, Pennsylvania.

After the complaint in this matter was issued, Richard Kimble went to Boston in early May 1981, after Keller told Rocky that Richard could report back to work. Keller put Richard in touch with the local union business agent and within a few days he was sent to the job from the union hall and hired. After being hired by the Re-

<sup>2</sup> This finding is based on the credited testimony of Richard Kimble and his brother Rocky Kimble. Keller admitted that the incident occurred as they described it and did not deny the statements attributed to him.

<sup>3</sup> Kimble did work briefly at the Indianhead site, but with an unrelated company, Sterling Wright Industries, apparently, a subcontractor of the Respondent.

spondent on the Boston job, Richard was laid off on three occasions between the time he started and September 21, 1981. The General Counsel contends that these layoffs were discriminatorily motivated and created undue hardship for Kimble whose home was in West Virginia, over 600 miles away. The evidence establishes that layoffs occurred at the completion of each 5-mile section of track and, generally, most of the workers were laid off while the completed section was inspected. Although these layoffs usually lasted a week or two, Richard Kimble was off for 3 weeks on one occasion in July 1981. However, Kimble testified that he and Rocky, with whom he rode back and forth from West Virginia, had received permission to take a week off and, before returning, learned that a 2-week between-sections layoff had occurred. He agreed that the other layoffs referred to by the General Counsel coincided with the between-sections layoffs which affected not only him but also other employees as well.

#### *B. Analysis and Conclusions*

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when Keller threatened Richard Kimble with reprisals during their argument about whether the employees were entitled to showup pay during the summer of 1980 on the Julian job. Kimble was clearly engaged in protected concerted activity when, in his capacity as union steward, he demanded that the Respondent comply with the terms of the collective-bargaining agreement covering the job.<sup>4</sup> There is no indication that, at the time, Kimble was not acting in good faith with respect to what he thought the contract's showup pay provision required, although he later learned and admitted to Keller that he was wrong about it. Keller's statement during the argument about showup pay that Kimble thought he had power because they were on a coal mine job, but that he, Keller, would show him "who had the power" was an unlawful threat of reprisals against Kimble for engaging in such protected activity in violation of Section 8(a)(1) of the Act.

The complaint alleges that the Respondent also violated Section 8(a)(1) when Keller told Rocky Kimble that Richard Kimble would not be hired because of his actions while he was the union steward on the Julian job. As noted, Keller not only denies making such statements but also denies that he even had the telephone conversations in which the statements were allegedly made. In resolving the conflict in the testimony of Keller and Rocky Kimble, which is critical both on this issue and that of the Respondent's alleged refusal to reemploy Richard Kimble, I found Rocky to be the more credible witness. This finding is based in part upon my observation of their demeanor while testifying (Rocky was a forthright and convincing witness who displayed an ability to remember the details as well as the substance of the events and conversations he testified about; Keller on the other hand appeared hesitant and seemed to selectively recall only what he considered favorable to the Respondent's case), upon the facts established by other evidence in the

record, the reasonable inferences drawn therefrom, and the inherent probabilities, all of which favor Rocky's version over Keller's.

If, as Keller testified, he did not have a telephone conversation with Rocky Kimble in early September 1980, prior to Rocky's going to work on the Boston job, it is difficult to understand how Rocky got there. Keller left the Julian job before it was finished to go to Massachusetts and Rocky went from Julian to a job near Philadelphia sometime in August. It was the Respondent's practice not to recall laborers laid off at the end of a job when a new job started, but to leave it up to them to find out when and where work was available. While Keller also denied that he ever discussed employing Woods and Hayes with Rocky, I doubt that two individuals with no railroad construction experience would travel over 600 miles to the Boston job without some assurances from Keller that they would be hired. They went to the Boston job with Rocky and it is reasonable to infer that they received such assurance at the same time Rocky was told to report to the job. In an apparent attempt to disassociate the hiring of Woods and Hayes from the hiring of Rocky, Keller testified that the only people he asked to the Boston job from West Virginia were six or seven men he wanted as foremen and that Rocky was included in the group. Rocky was not hired as a foreman and there is no evidence that his becoming a foreman was ever mentioned to him prior to his going to Boston. He did not become a foreman until the job, which closed down in November 1980 because of the weather, started up again in the spring of 1981. However, Keller's testimony does confirm that there was contact between him and Rocky Kimble before Rocky started on the Boston job. Keller twice stated that Richard Kimble was still working at the Julian job when Rocky, Woods, and Hayes were hired in Boston. The other evidence in the record does not so indicate and the Respondent did not produce any records to substantiate this assertion.

I find that Keller and Rocky Kimble did have the telephone conversation Rocky described prior to his being hired on the Boston job and that Keller told him that the Respondent would not hire Richard Kimble because of his actions while serving as the union steward on the Julian job and that this act of reprisal interfered with rights of the Respondent's employees protected by Section 7 of the Act, in violation of Section 8(a)(1).

Although it was not the Respondent's practice to contact for recall laborers laid off at the end of specific jobs, it did rehire such laborers when work was available and they contacted the Respondent and made it known they were interested in obtaining work. When Rocky Kimble contacted Keller in early September 1980, he informed the Respondent of Richard Kimble's availability and desire for work as well as that of himself, Woods, and Hayes. That work was available is established by Keller's telling Rocky to report to the Boston job the following week along with Woods and Hayes and their subsequent employment on that job. Since Richard Kimble was an experienced railroad construction worker, one would expect that he would be offered work by the Respondent

<sup>4</sup> *Interboro Contractors, Inc.*, 157 NLRB 1295, 1299 (1966); *Hilton Hotels Corporation, d/b/a The O'Hare Hilton*, 248 NLRB 255, 258 (1980).

before either Woods or Hayes who had no such experience and whom Keller did not even know. The only explanation as to why Richard Kimble was not offered work on the Boston job is that given by Keller to Rocky Kimble in their telephone conversation and repeated to Richard Kimble about 2 months later in another telephone conversation: Richard Kimble would never work for the Respondent again because of his activity as the union steward on the Julian job.

Although at the hearing Keller claimed that hiring was done through a local union hall and that he had no control over who was employed on the Boston job, this was not mentioned in his telephone conversation with Rocky. At that time, his problem with the local union had not even begun. It started the following week when the Respondent attempted to put on some of the men Keller had invited to the job from West Virginia, including Rocky, Woods, and Hayes. It appears that, although the job was briefly shut down, the problem was resolved by an agreement between the Respondent and the local union providing that a certain number of local people would be hired for each out-of-state man hired and that this agreement enabled the Respondent to hire the people it wanted and had invited to the job from West Virginia. Consequently, if Richard Kimble had been asked to Massachusetts in September, he would have been hired within 3 to 11 days, as were Rocky, Woods, and Hayes. Keller's statement that Richard Kimble would never again work for the Respondent made it clear that any attempt by Richard Kimble to obtain employment on the Boston job in September 1980 would be futile.

The Respondent also contends that it did not ask Richard Kimble to the Boston job because the only people it asked to come from West Virginia were those it wanted as foremen and Kimble had previously indicated that he was not interested in being a foreman. As noted above, Rocky Kimble was asked to the job by Keller, hired within 3 or 4 days of the resolution of the problem about hiring out-of-state workers and did not become a foreman until the following spring. Neither Woods nor Hayes, who went to the job with Rocky and were hired within a week of his hiring, ever became a foreman. In any event, the evidence establishes that the Respondent did not merely fail to seek out Kimble and offer him employment on the Boston job, rather, when the Kimbles contacted Keller and asked for available work, in accordance with the established practice whereby laborers obtained work on the Respondent's jobs, Keller made it clear that Richard Kimble would not be hired for no other reason than his union activity on the Julian job. The Respondent's discriminatory action in refusing to reemploy Richard Kimble between September 1980 and May 1981 solely because of his protected union activity violated Section 8(a)(1) and (3) of the Act.

I also find that after Richard Kimble was hired on the Boston job by the Respondent he was laid off on three occasions prior to September 21, 1981;<sup>5</sup> that on each oc-

casion his layoff was part of a scheduled general layoff occurring at the completion of a section of track; and that none of these layoffs of Richard Kimble was discriminatory or involved any violation of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent, Atlas Railroad Construction Co., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening reprisals against Richard Kimble for engaging in protected concerted activity in seeking to require the Respondent to comply with the terms of a collective-bargaining agreement and by informing an employee that it was taking reprisals against Kimble because he had engaged in protected concerted activity.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reemploy Richard Kimble for available work between September 1980 and May 1981, because he had previously sought to require the Respondent to comply with the terms of a collective-bargaining agreement while serving as a union steward.

5. The Respondent did not violate the Act when it laid off Richard Kimble on three occasions between the time he was reemployed in May 1981 and September 21, 1981.

6. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent discriminated against Richard Kimble by failing to reemploy him for available work between September 1980 and May 1981 when he was hired by the Respondent, I shall recommend that the Respondent be ordered to make Richard Kimble whole for any losses he may have suffered by reason of the discrimination against him during that period. Backpay shall be reduced by any interim earnings and computed in the manner prescribed in *F. W. Wool-*

hearing on this matter on October 5, 1981, in violation of Sec. 8(a)(4) of the Act. Notice of such a possible violation was first given to counsel for the Respondent less than 2 working days before the scheduled hearing. Counsel for the Respondent was located in Washington, Pennsylvania, the alleged violation occurred at the jobsite near Boston, Massachusetts, and the hearing was being held in Charleston, West Virginia. The parties did not wish to postpone the hearing until the Respondent's counsel could investigate and prepare to defend against this alleged violation. I denied the motion to amend the complaint without prejudice to the filing of a new charge based on this incident so that the Respondent could have a reasonable opportunity to prepare its defense. I also agreed to consider evidence concerning the events occurring on September 21, 1981, insofar as it might bear on the contention that the Respondent had discriminated against Richard Kimble by laying him off on other occasions after his hiring on the Boston job in May 1981. I find that none of the evidence concerning what occurred on September 21, 1981, is relevant to the question of whether the other layoffs were improper and, therefore, I have made no factual or credibility findings with respect to that evidence.

<sup>5</sup> Richard Kimble was laid off by the Respondent on September 21, 1981. At the hearing, counsel for the General Counsel moved to amend the complaint to allege that Kimble was laid off on that date because he had informed the Respondent that he intended to go through with the

worth Company, 90 NLRB 289 (1950), with interest to be computed as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>6</sup> The Respondent will also be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>7</sup>

The Respondent, Atlas Railroad Construction Co., Eighty-Four, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals because they have engaged in union or other concerted activities for the purpose of mutual aid and protection.

(b) Telling employees that it will not rehire an employee in reprisal for his having engaged in union or other concerted activities.

(c) Refusing to reemploy former employees because they have engaged in union or other concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Make Richard Kimble whole for any losses he may have suffered by reason of its unlawful refusal to reemploy him between September 1980 and May 1981, in the manner set forth in the section herein entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Eighty-Four, Pennsylvania, facility copies of the attached notice marked "Appendix."<sup>8</sup>

<sup>6</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>7</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>8</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursu-

Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by an authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

ant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten to take reprisals against our employees because they engage in union or other concerted activities.

WE WILL NOT tell our employees that we will not rehire former employees because they have engaged in union or other concerted activities.

WE WILL NOT discourage membership in United Mine Workers of America, Local 1582, or any other labor organization, by discriminatorily refusing to rehire former employees or in any other manner discriminating against them with respect to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL make Richard Kimble whole for any losses he may have suffered as a result of our unlawful failure to rehire him, plus interest.

ATLAS RAILROAD CONSTRUCTION CO.